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In The Supreme Court of the United States

JAMAL KIYEMBA, et al.,
Petitioners,

v.

BARACK OBAMA, PRESIDENT
OF THE UNITED STATES, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF GUANTANAMO DETAINEES, UMAR HAMZAYEVICH ABDULAYEV AND OTHER GUANTÁNAMO DETAINEES, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
STATEMENT OF *AMICI* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 4
I. *Amici*, Like Numerous Other Guantánamo Detainees, Face a Serious Risk of Torture or Disappearance if Transferred to Their Various Countries of Citizenship 4
II. By Permitting Executive Fiat to Replace Individualized Consideration of Core Habeas Claims Against Transfer, the Court of Appeals' Decision Undermines Separation of Powers Principles and Threatens to Subject Numerous Detainees to Grave Harm 14
A. The Judiciary Must Play a Role in Checking Executive Transfer Decisions Because They Implicate Individual Rights 14
B. The Court's Narrow Ruling in *Munaf* Does Not Categorically Preclude Judicial Review of a Proposed Involuntary Transfer 20
C. Neither the Rule of Non-Inquiry Nor the Separation-of-Powers Principles

Underlying It Render the Judiciary Incompetent to Undertake Targeted Inquiries Into Risk of Torture Upon Transfer 24
CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Ahmed v. Keisler,
504 F.3d 1183 (9th Cir. 2007) 25

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613 F. Supp. 2d 51 (D.D.C. 2009) 19

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559 F.3d 539 (D.C. Cir. 2009) 17

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No. 05-C-359 (GK) (D.D.C. Oct. 2, 2007) 14

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646 F. Supp. 2d 20 (D.D.C. 2009) 19

Belbacha v. Bush, No. 05-2349
(D.D.C. July 26, 2007) 10

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128 S. Ct. 2229 (2008) .....passim

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548 U.S. 556 (2006) 3

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) .....passim

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465 F.3d 554 (3d Cir. 2006)..... 26

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151 U.S. 242 (1894) 16

In re Burt,
737 F.2d 1477 (7th Cir. 1984) 26, 27
INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 25
INS v. St. Cyr,
533 U.S. 289 (2001) 16
Jabbarov v. Bush,
Civ. A. No. 05-2386 (D.D.C. June 8, 2009) 6
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371 U.S. 236 (1963) 22
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561 F.3d 509 (D.C. Cir. 2009) .....passim
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480 F.3d 664 (4th Cir. 2007) 26
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128 S. Ct. 2207 (2008) .....passim
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180 U.S. 109 (1901) 25
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575 F.3d 956 (7th Cir. 2009) 26
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734 F.2d 1016 (4th Cir. 1984) 26
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542 U.S. 466 (2004) 3
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11 U.S. 116 (1812) 20
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61 F.3d 711 (9th Cir. 1995) 25

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8 U.S.C. § 1101(a)(42)(A) 25

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STATEMENT OF *AMICI*[1]

Amici Curiae Umar Hamzayevich Abdulayev, Ravil Mingazov, Ahmed Belbacha, Abdul Aziz Naji, Maasoum Abdah Mouhammad, Abdul Hadi Omer Mahmoud Faraj, Abu Abdul Rauf Zalita, Abdul Hamid Al-Ghizzawi, Rafiq Bin Bashir Bin Jallul Alhami and Mohammed Abdul Rahman are all individuals detained by the United States government in Guantánamo Bay. They are nationals of Tajikstan, Russia, Algeria, Libya, Syria and Tunisia – countries with notorious human rights records, including recognized practices of torture and abuse. Some *amici* are nationals of countries in which previously transferred detainees were in fact tortured and abused.

Some *amici* have been cleared by the Government for transfer from Guantánamo to their home country. Each *amici* has obtained from the district court an order requiring the Government to provide thirty days notice in advance of transfer, similar to the order obtained by Petitioners ("Thirty Day Notice Order"), giving *amici* an opportunity to raise factual or legal objections to a proposed transfer, and at least two of them (Abdulayev and Alhami) have ob-

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1 The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief.

tained a preliminary injunction barring transfer to his home country after such notice was given.

Amici are greatly concerned that the lower court's decision, if not reversed by this Court, would lead to *vacatur* of those Orders and subject *amici*, and other similarly situated Guantánamo detainees, to a grave risk of torture. *Amici* wish to highlight the various fact-specific circumstances that cause each to fear torture upon return to their home countries,[2] and to emphasize that the Executive's blanket "policy" purportedly restricting transfers to countries posing a risk of torture, absent individualized judicial review, will continue to prove insufficient to protect *amici* from grave harm.

SUMMARY OF ARGUMENT

The Court of Appeals' decision endorses a position consistently advocated by the Executive – yet repeatedly rejected by this Court – that Executive decisions regarding detention operations should be immune from judicial review so long as these decisions implicate an area of Executive prerogative or expertise. Specifically, the Court of Appeals unhesitatingly accedes to the "government's assessment" of the likelihood that a petitioner might face torture abroad, based only upon a government official's four-

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[2] Some *amici* have confidential information that they have presented to the district courts under seal regarding their particularized fear of torture, but wish not to share as part of a public filing with this Court.

year old declaration proclaiming the Executive's good faith efforts to avoid subjecting a petitioner to torture. *Kiyemba v. Obama*, 561 F.3d 509, 514, 516 (D.C. Cir. 2009). Yet the central, unifying lesson of this Court's so-called "enemy combatant cases" is that, under fundamental separation-of-powers principles, neither war nor the Executive's foreign relations power provides the Executive a "blank check" to act in areas that affect individual rights. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion); *Hamdan v. Rumsfeld*, 548 U.S. 556, 636 (2006) (Breyer, J, concurring); *see also Rasul v. Bush*, 542 U.S. 466 (2004). Because, as the Court of Appeals recognized, challenges to Executive transfer are a core guarantee of habeas corpus, detainees must have an opportunity to individually challenge the factual basis of the Executive's judgment about the legality of a proposed transfer. *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008).

The Court of Appeals also transformed this Court's narrow, fact-specific holding in *Munaf v. Geren*, 128 S. Ct. 2207 (2008), proscribing a court's interference with a foreign ally's territorial sovereignty, into a blanket jurisdictional prohibition on judicial review of core habeas challenges to transfer. Such a reading cannot be squared either with the fundamental separation-of-powers principles articulated in *Hamdi*, *Hamdan* and *Boumediene* or with the peculiar circumstances that governed *Munaf* itself. Indeed, contrary to the Court of Appeals' central premise, courts every day evaluate Executive assessments regarding likelihood of torture, fully consistent with separation-of-powers principles.

Amici each face a risk, in some cases imminent, of transfer to repressive countries with deplorable human rights records. Unlike the *Munaf* petitioners, *amici* do not ask a U.S. court to review a foreign judgment or thwart an ally's police operations within its territory. Instead, *amici* merely seek notice and an opportunity to present particularized facts regarding the risk of torture that awaits them should they be returned to their country of citizenship – relief that a district court is fully competent to provide. The Court should grant *certiorari* to review the Court of Appeals' sweeping disregard of this Court's prior rulings and to ensure that Executive fiat does not replace the Great Writ's role as "an indispensible mechanism for monitoring separation of powers." *Boumediene*, 128 S. Ct. at 2259.

ARGUMENT

I. *AMICI*, LIKE NUMEROUS OTHER GUANTÁNAMO DETAINEES, FACE A SERIOUS RISK OF TORTURE OR DISAPPEARANCE IF TRANSFERRED TO THEIR VARIOUS COUNTRIES OF CITIZENSHIP.

According to a recent Department of Defense ("DoD") announcement, 116 Guantánamo detainees have been cleared for release – an administrative designation signifying that President Obama's Guantánamo Review Task Force no longer wishes to imprison a detainee, and has begun the process of

transferring him to his country of citizenship or to a third country.[3] Of that number, there remain at least seven Chinese nationals (Uighurs), seven Tunisians, seven Algerians, two Syrians, three Libyans and one Tajik.[4] Thus, *amici* and a great number of other Guantánamo detainees have a real, and in some cases imminent, concern of being transferred to countries with notorious human rights records and where *amici* themselves face serious risks of torture and abuse. In some cases, the risk of torture exists solely because of U.S. government conduct. By transporting detainees from their adopted homes in Afghanistan and Pakistan and labeling them "enemy combatants," the U.S. created a risk of torture for detainees in countries they departed long ago.

Amici have in place Thirty Day Notice Orders similar to those obtained by Petitioners (or, in the case of Abdulayev and Alhami, preliminary injunctions barring transfer to their home countries). These Notice Orders are a vitally important mechanism to ensure that, if they have a principled objection to transfer, *amici* will be afforded an opportunity to put particular facts before the district court that might rebut the Executive's unilateral assess-

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[3] *See More Than Half Guantanamo Inmates Can be Transferred: US*, AGENCE FRANCE-PRESSE, Dec. 3, 2009 (quoting Secretary Gates' Senate testimony), http://www.google.com/hostednews/afp/article/ALeqM5hPHEYKHwDT-QmK97ap1iOdHNuQ1g.

[4] Carol Rosenberg, *78 Guantánamo Detainees Cleared to Leave*, MIAMI HERALD, Sept. 28, 2009.

ment that no such risk exists and to ensure the Executive is acting pursuant to applicable constraints imposed by Due Process and the *non-réfoulement* provisions of the Convention Against Torture ("CAT"). *Amici*'s cases underscore the need for an individualized determination of the risks of transfer for each detainee.

Umar Hamzayevich Abdulayev

Amicus Umar Hamzayevich Abdulayev is a Tajikistan national who has been cleared by the Guantánamo Review Task Force for transfer to Tajikstan. He reasonably fears torture and his murder if he is repatriated there.

Mr. Abdulayev fled Tajkistan with his parents and siblings in 1992 during the Tajik civil war, when he was thirteen, and has never returned. Around November 25, 2001, Pakistani police officers arrested Mr. Abdulayev at a market in a Pakistani refugee camp where Mr. Abdulayev lived with his mother and siblings. He was eventually transferred to Guantánamo. While at Guantánamo, Tajik government officials repeatedly threatened Mr. Abdulayev during three interrogation trips. The Tajik officials pressured Mr. Abdulayev to work for them as a spy in Afghanistan, where he had lived for a time after fleeing Tajikistan.[5] Angered by Mr. Abdu-

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[5] Petitioner Abdulayev's Opposition to Respondents' Motion for a Stay of Proceedings, *Jabbarov. v. Bush*, Civ. A. No. 05-2386, (D.D.C. June 8, 2009), Exhibit C, ¶ 23.

layev's refusals to cooperate, the Tajik officials specifically threatened to imprison, torture and even "get rid of" him.[6]

The Tajik officials' specific threats of torture against Mr. Abdulayev are especially concerning in light of that government's recognized history of human rights abuses. The U.S. State Department's Country Report finds Tajik security officials frequently employ torture and abuse, including "systematic beatings, sexual abuse, and electric shock to extort confessions during interrogations."[7] Amnesty International has observed that "[w]idespread and routine torture or other ill-treatment by law enforcement officers continue to be reported."[8] Similarly, Human Rights Watch reports that "[e]xperts agree that in most cases there is impunity for rampant torture in Tajikistan."[9]

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6 *Id.*

7 U.S. Dep't of State, Country Report on Human Rights Practices in Tajikistan 2 (2007), http://www.state.gov/g/drl/rls/hrrpt/2007/100621.htm.

8 Amnesty Int'l, Tajikistan – Amnesty International Report 2007 1 (2007), http://www.amnesty.org/en/region/ tajikistan/report-2007.

9 Human Rights Watch, Tajikistan – Events of 2008 3 (2008), http://www.hrw.org/en/node/79352.

Ravil Mingazov

Of the eight Russian men originally imprisoned in Guantánamo, Ravil Mingazov is the last one remaining. He left Russia because he suffered from the religious persecution of Muslims prevalent there, which has only worsened in the intervening years.[10] In 2004, the U.S. transferred the seven other Russian detainees to Russia, where they were immediately charged with criminal conduct and committed to prison. While in prison, and *despite* diplomatic assurances given to the U.S. government that they would be treated humanely, "[s]ome endured mistreatment in detention that amounted to torture" and continued to be "hounded and abused" by Russian law enforcement upon their release.[11]

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[10] *See, e.g.*, U.S. Dep't of State, *Country Report on Human Rights Practices in Russia 1 (2007)*, http://www.state.gov/g/drl/rls/hrrpt/2007/100581.htm.

[11] *See* Human Rights Watch, *The Stamp of Guantánamo: The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*, 19(2) 3 (March 2007), http://www.hrw.org/reports/2007/russia0307/.

Part of the Executive's "assessment" that a detainee will not face torture upon transfer turns on such diplomatic assurances. *See* Gov't App. 104-06 (Prosper Decl. at ¶¶8-9); Gov't App. 110-11 (Waxman Decl. ¶¶6-7). Yet, diplomatic assurances from notorious human rights abusers, such as the countries' of *amici*'s citizenship, are inherently unreliable and only underscore "the fact that . . . there is clearly an acknowledged risk of torture and ill-treatment." Council of Europe, Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, April 21-23, 2004, CommDH(2004)13 at ¶ 19 (July 8, 2004). For these reasons, the U.N. Committee Against Torture has specifically instructed

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Ahmed Belbacha, Abdul Aziz Naji and Other Algerians

Many of the seven Algerian detainees, including *amici* Ahmed Belbacha and Abdul Aziz Naji, fear for their safety in the event they are repatriated to Algeria. Historically, Algeria has immediately detained each prisoner that the U.S. has transferred to Algeria, including seven men returned in 2008.[12] Suspected terrorists are dealt with harshly in Algeria, where torture, abuse and long-term incommunicado detention is prevalent.[13] *Amicus* Belbacha, who was recently convicted *in absentia* by an Algiers

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that "[w]hen determining the applicability of its *non-refoulement* obligations under article 3 of the Convention, the [United States] should only rely on 'diplomatic assurances' in regard to States which do not systematically violate the Convention's provisions." U.N. Comm. Against Torture, *Conclusions and Recommendations to U.S.*, ¶21, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

[12] Amnesty Int'l 2009 Annual Report for Algeria (2009), http://report2009.amensty.org/en/regions/middle-east-north-africa/algeria.

[13] *See* U.S. Dep't of State, *Country Report on Human Rights Practices in Algeria* (2008), http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119112.htm; *Briefing: Amnesty International opposes forcible return to Algeria of Algerian nationals detained by US authorities at Guantánamo Bay, Cuba*, Sept. 18, 2009, en/library/infor/ MDE.28/006/2009/en at 4 (despite laws prohibiting torture, "[t]orture and other forms of ill-treatment against individuals suspected of terrorism take place in Algeria in a climate of virtually total impunity.").

court for belonging to an "overseas terrorist group,"[14] has presented the district court with evidence demonstrating his particular reasons to fear torture upon transfer.[15] *Amicus* Naji, who has been cleared for transfer from Guantánamo, has a similarly precise fear of persecution. Algerian officials who visited him in Guantánamo suggested, falsely, that he could be a member of Groupes Islamiques Armés (GIA), a militant Algerian organization, whose suspected members are dealt with harshly.[16]

Maasoum Abdah Mouhammad, Abdul Hadi Omer Mahmoud Faraj and Other Syrians

Approximately seven Syrian nationals, including *amici* Maasoum Abdah Mouhammad and Abdul Hadi Omer Mahmoud Faraj, fear for their safety in the event they are repatriated to Syria. Syria is a repressive state with a deplorable record of human rights abuses, including the pervasive use of torture and physical abuse (sometimes resulting in death).[17]

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[14] *See Algeria Court Sentences Guantánamo Detainee Seeking Asylum in US*, 2009/11/algeria-court-sentences-Guantánamo.php.

[15] He filed this evidence under seal in a motion to the district court in order to protect himself from retribution by the Algerian government. *Belbacha v. Bush*, No. 05-2349 [Dkt. No. 26] (D.D.C. July 26, 2007).

[16] *See supra* note 13.

[17] *See* U.S. Dep't of State, *2008 Human Rights Report: Syria* 1-12 (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119127.htm.

Syrian detainees face a grave risk of torture merely because of their detention at Guantánamo. Suspected terrorists in Syrian custody were "subject to torture and mistreatment,"[18] and this "[t]orture and other ill-treatment [was] committed with impunity;" military police are reported to have killed at least 17 detainees.[19] Moreover, as an ethnic Kurd, Mr. Mouhammad presents specific facts that heighten his risk of torture. A stateless minority in Syria, Kurds suffer persecution[20] and state-sponsored violence, including in Mr. Mouhammad's home town of Al-Qameshli.[21]

Abu Abdul Rauf Zalita and Abdul Hamid Al-Ghizzawi

Amici Abu Abdul Rauf Zalita and Abdul Hamid Al-Ghizzawi are Libyan citizens who have spent a significant portion of their adult lives fleeing persecution at the hands of Colonel Muammar Al-Qadhafi's notoriously abusive regime. They face a grave risk of persecution, torture and extrajudicial

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18 *Id.* at 19.

19 Amnesty Int'l, *Human Rights in Syrian Arab Republic* 1 (2009), http://www.amnesty.org/en/region/syria/report-2009.

20 Amnesty Int'l, *Amnesty International Report 2009 – Syria*, 317 (2009), http://thereport.amnesty.org/eng/Regions/Middle-East-and-North-Africa/Syria.

21 Human Rights Watch, *Syria: Address Grievances Underlying Kurdish Unrest*, Mar. 19, 2004, http://hrw.org/en/news/2004/03/18/syria-address-grievances-underlying-kurdish-unrest.

assassination if transferred there. Torture in Libyan prisons is "routine[]"[22] and includes:

> chaining prisoners to a wall for hours; clubbing; applying electric shock; applying corkscrews to the back; pouring lemon juice in open wounds; breaking fingers and allowing the joints to heal without medical care; suffocating with plastic bags.[23]

One former CIA detainee repatriated to Libya, Shaykh al Libi, recently died in Libyan prison under suspicious circumstances.[24]

Rafiq bin Bashir bin Jallul Alhami, Mohammed Abdul Rahman, and Other Tunisians

Eight Tunisians, including *amici* Rafiq bin Bashir bin Jallul Alhami and Mohammed Abdul Rahman are detained at Guantánamo Bay and fear repatriation to their home country. The State Department has documented reports of torture and

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22 U.S. Dep't of State, Country Reports on Human Rights Practices– Libya -2006 2 (March 6, 2007), http://www.state.gov/g/drl/rls/hrrpt/2006/78858.htm.

23 U.S. Dep't of State, 2008 Human Rights Report: Libya 2 (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119121.htm.

24 Peter Finn, *Detainee Who Gave False Iraq Data Dies in Prison in Libya*, WASH. POST, May 12, 2009.

other abuse by Tunisian security forces against detainees,[25] including the use of:

> sleep deprivation; electric shock; death threats; submersion of the head in water; beatings with hands, sticks, and police batons. . . . threatened and actual sexual assault against prisoners' wives to extract information, intimidate, and punish.[26]

Tunisian officials routinely refuse to register complaints or investigate allegations of torture, or provide victims with medical care until evidence of abuse has disappeared.[27]

Indeed, the Tunisian government has reportedly tortured and abused two Tunisian detainees repatriated from Guantánamo on June 17, 2007, Abdellah Ben Omar al Hajji and Lufti Ben Swei Lagha, *despite* contrary diplomatic assurances offered to the U.S. Government.[28] Tunisian terror suspects who

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25 U.S. Dep't of State, *2008 Human Rights Report: Tunisia* 2 (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119128.htm.

26 *Id.* *See also* Human Rights Watch, *2009 World Report* 518 (2009), http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf.

27 *Id.*

28 Human Rights Watch, *Ill-Fated Homecomings: A Tunisian Case Study of Guantánamo Repatriations*, HUMAN RIGHTS

Continued on following page

were forcibly repatriated from Italy, France, Egypt, and other nations have also reportedly experienced torture, prolonged incommunicado detention, and other inhumane treatment.[29] Moreover, due to his grave health conditions, Mr. Rahman presents specific facts that demonstrate an individual fear of ill-treatment and death upon repatriation to Tunisia.[30]

II. BY PERMITTING EXECUTIVE FIAT TO REPLACE INDIVIDUALIZED CONSIDERATION OF CORE HABEAS CLAIMS AGAINST TRANSFER, THE COURT OF APPEALS' DECISION UNDERMINES SEPARATION OF POWERS PRINCIPLES AND THREATENS TO SUBJECT NUMEROUS DETAINEES TO GRAVE HARM.

A. The Judiciary Must Play a Role in Checking Executive Transfer Decisions Because They Implicate Individual Rights.

The Government advances here the same version of Executive preeminence this Court rejected in

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Continued from previous page
WATCH 19(4), 3 (Sept. 2007). *See also* Jennifer Daskal, *A Fate Worse than Guantánamo*, WASH. POST (Sept. 2, 2007).

[29] Amnesty Int'l, *Tunisia: In the Name of Security: Routine Abuses in Tunisia*, 29-33 (June 23, 2008), http://www.amnesty.org/en/library/info/MDE20/0007/2008/en.

[30] *See* Memorandum Order 3, *Alhami v. Bush*, No. 05-C-359 (GK) (D.D.C. Oct. 2, 2007) (order granting permanent injunction) (Dkt. 58).

Hamdi and *Boumediene*. In *Hamdi*, the Executive argued that any "individual process" or "factual exploration" by the judiciary regarding the Executive's bases for detaining a so-called "enemy combatant" was categorically impermissible in light of a "respect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making." 542 U.S. at 527. The Executive demanded that this Court accept the facial validity of a Defense Department official's declaration, which purported to resolve the very question presented for judicial determination – whether Hamdi was in fact a combatant. *Id.* at 527-28 (instructing Court to "*assume the accuracy* of the Government's articulated basis for Hamdi's detention") (emphasis added).

Eight Justices of the Court rejected this position as an inversion of separation of powers. *See Hamdi*, 542 U.S. at 536-37 (plurality opinion); *id.* at 541 (Souter, J., concurring); *id.* at 564 (Scalia, J., dissenting). While acknowledging that "core strategic matters of warmaking" belong to the political branches, *id.* at 531, the plurality emphasized that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* at 535-6. Whatever marginal burden such inquiry would place on the Executive, there must remain "a basic system of independent review." *Id.*

Similarly, in *Boumediene*, the Executive contended that any judicial inquiry as to the lawfulness of a petitioner's detention should be limited to a constricted and deferential review of its own judgment –

i.e., the conclusions of the Combatant Status Review Tribunal administrative process. *See Boumediene*, 128 S. Ct. at 2262. But the Court concluded that such limited review, even when performed in a "wartime" setting, was an inadequate substitute for the core protections of habeas corpus because it had precluded the "detainees' ability to rebut the factual basis for the Government's assertion that he is an enemy combatant." *Id.* at 2269; *see also id.* at 2273 ("If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court."). Judicial review of the Executive's factual and legal basis to detain is necessary to "call the jailer to account," 128 S. Ct. at 2247, and to maintain the "'delicate balance of governance' that is itself the surest safeguard of liberty." *Id.* (quoting *Hamdi*, 542 U.S. at 536).

As the Court of Appeals rightly concluded here, judicial orders barring transfer constitute a core attribute of habeas relief. *Kiyemba*, 561 F.3d at 513 (citing, *inter alia*, *INS v. St. Cyr*, 533 U.S. 289, 305-08 (2001); *In re Bonner*, 151 U.S. 242, 255-56 (1894); *McMahon*, 127 U.S. 457, 462 (1888)); *see also Kiyemba*, 561 F.3d at 523 (Griffith, J., concurring in part and dissenting in part).[31] Given that premise, the Court of Appeals' ultimate conclusion categorically barring judicial review is untenable.

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[31] *See generally* Brief of Legal Historians and Experts in Habeas Corpus as *Amici Curiae* in Support of Petitioners, *Kiyemba v. Obama*, No. 09-581 (Dec. 14, 2009).

The Executive's wartime and foreign relations powers invoked here, *see* Supp. Br. for Appellants, 21-23, *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. Aug. 21, 2008) are no broader than the Executive's Commander-in-Chief power repeatedly invoked in *Hamdi* and *Boumediene*. As such, the judiciary no more has to accept the Executive's unilateral and potentially self-serving "assessment of the likelihood a detainee will be tortured" upon transfer, *Kiyemba*, 561 F.3d at 515,[32] let alone a general "Government policy" against transfers to torture, *id.* at 514, than it is obligated to accept the Executive's assessment that a detainee is lawfully detained, *compare Hamdi*, 542 U.S. at 537, or is detained pursuant to an purportedly valid "Government policy" concerning

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[32] In *Hamdi*, this Court refused to accept as conclusive the declaration of the Special Advisor to the Undersecretary of Defense for Policy on the question of a habeas petitioner's combatant status. *See Hamdi*, 542 U.S. 537. Yet the Court of Appeals here accepts a four-year old declaration by the former Ambassador at Large for War Crimes Issues, about the Government's good-faith efforts to avoid transferring any detainee to torture, as conclusive proof that an individual petitioner in 2009 would not suffer torture upon transfer regardless of his particular circumstances. Proclamation cannot substitute for proof. *See Al Odah v. United States*, 559 F.3d 539, 545 (D.C. Cir. 2009) (rejecting Government's assertion that certain redacted information was immaterial because a "naked declaration cannot simply resolve the issue"); *Parhat v. Gates*, 382 U.S. App. D.C. 233, 248 (D.C. Cir. 2008) (observing "the fact that the government 'has said it thrice' does not make the allegation true") (quoting Lewis Carroll, *The Hunting of the Snark* (1874)).

the rights of detainees. *Compare Kiyemba*, 561 F.3d at 525 (Griffith, J., concurring in part and dissenting in part) ("Critical to ensuring the accuracy of the government's representations is an opportunity for the detainees to challenge their veracity. The rudimentaries of an adversary proceeding demand no less."). No theory of separation of powers could relegate the Judicial Branch, as the Court of Appeals does, to a rubber stamp of Executive proclamation. Viewing it as such "serves only to *condense* power into a single branch of government." *Hamdi*, 542 U.S. at 535 (plurality opinion).

Similarly, undifferentiated assertions about the burdens judicial inquiry will place on the Executive's ability to transfer detainees or to conduct foreign relations cannot excise the judiciary from our separation of powers scheme. *Boumediene*, 128 S. Ct. at 2261 ("compliance with any process requires some incremental expenditure of resources"); *Hamdi*, 542 U.S. at 535 (plurality opinion) (threats to military operations do not categorically trump detainee's "core rights to challenge meaningfully the Government's case."). As this Court has recognized, district courts are fully competent to undertake a fact-finding approach that is "prudent and incremental," *Hamdi*, 542 U.S. at 535, and to make "accommodations," *Boumediene*, 128 S. Ct. at 2276, to particularly sensitive concerns presented by the Executive. Ultimately, the Executive's decision to transfer a petitioner pursuant to law is "vindicated, not eroded when confirmed by the judicial branch." *Boumediene*, 128 S. Ct. at 2277.

The wisdom of this Court's previous refusal to validate Executive fiat has been borne out dramatically in subsequent proceedings. On remand from *Boumediene*, the district courts have found an insufficient factual or legal basis to detain in a remarkable thirty-one out of thirty-nine cases.[33] In other words, the Executive's assessment, but for judicial review, would have been incorrect 80% of the time.[34] There is no reason for the Court to believe an Executive assessment regarding the likelihood of torture would be any more reliable.

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[33] *See* Daphne Eviatar, *Another Gitmo Detainee Wins in Federal Court; Score Is Detainees 31, United States 8*, WASH. INDEP., Nov. 20, 2009.

[34] The district courts' reviews of the evidence should give this Court considerable pause as it evaluates the authoritativeness of Executive assessments in the transfer context. *See, e.g.*, *Al Rabiah v. Obama*, Civ.A. No. 02-828 (CKK), 2009 WL 3083077, *1, 19 (D.D.C. Sept. 17, 2009) (characterizing Government's cumulative evidence as "surprisingly bare" and certain inferences from evidence "incredible" or "def[ying] logic"); *Al-Adahi v. Obama*, Civ.A. No. 05-280 (GK), 2009 WL 2584685, *15 (D.D.C. Aug. 21, 2009) (observing Government allegations "cannot rest on mere conjecture, with no hard evidence to support it"); *Awad v. Obama*, 646 F. Supp. 2d 20, 27 (D.D.C. 2009) (Government's evidence "gossamer thin"); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 57 (D.D.C. 2009) (rejecting host of evidence as unreliable, "equivocal and lacking in detail").

B. The Court's Narrow Ruling in *Munaf* Does Not Categorically Preclude Judicial Review of a Proposed Involuntary Transfer.

The Court of Appeals' conclusion that the judicial branch has no role in protecting individuals from involuntary transfer to torture, *Kiyemba*, 561 F.3d at 514, represents an extraordinary and untenable expansion of this Court's careful, fact-specific ruling in *Munaf*. Petitioners there were American citizens who, after voluntarily travelling to Iraq and allegedly committing terrorist acts there, were detained on Iraqi soil by United States military forces during an ongoing military conflict, in anticipation of trial by the Iraqi government. 128 S. Ct. at 2214-16; *see also id.* at 2228 (Souter, J., concurring) (emphasizing the eight facts upon which the Court's narrow ruling was based). The Court unanimously rejected petitioners' request, made under the guise of the court's authority to order habeas "release," for an "order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within the sovereign's borders." *Id.* at 2221. Such an interference with Iraqi sovereign authority, the Court observed, would have violated international law. *See id.* at 2221-22 (citing *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812)).

Munaf does not stand for the proposition that U.S. courts can *never* entertain challenges to the Executive's decision to transfer a detainee involuntarily, despite a fear of torture. *First*, the Court's defer-

ence to the Executive in *Munaf* must be read in light of the Court's particular, repeated concerns over respecting the territorial sovereignty of the host nation[35]—concerns which the present Petitioners and *amici* detainees, transferred to Guantánamo eight years ago by the U.S. government, do not implicate. Unlike the *Munaf* petitioners, *amici* and Petitioners are essentially refugees, a class of persons long entitled to legal protection and familiar to the judiciary.

Second, acceptance of the Court of Appeals' reading of *Munaf* would result in a sweeping reordering of the Executive and judiciary's established roles in cases involving a feared transfer to torture.[36] Indeed, this reading suggests that *Munaf*'s careful

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[35] *Munaf*, 128 S. Ct. at 2221 ("Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil"); *id.* at 2224 ("a sovereign's recognized prerogative to apply its criminal law to those alleged to have committed crimes within its borders"); *see also id.* at 2222 ("a nation state reigns sovereign within its own territory"); *id.* at 2225 (citing rule that "exemptions from territorial jurisdiction . . . are rather questions of policy than of law" in finding courts unsuited to challenge transfer).

[36] John T. Parry, *International Extradition, the Rule of Non-Inquiry and the Problem of Sovereignty* 44 (Nov. 17, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1508019 (*Munaf* cannot be read outside its particular circumstances to foreclose habeas review of transfers because such a categorical reading "would undermine fundamental due process protections against arbitrary seizure, detention, absence of process, and infliction of harm, and it would effectively create an executive prerogative to deal with the bodies of people according to the needs of foreign policy.").

and restrained decision nullified U.S. statutory implementations of the Convention Against Torture and the Refugee Convention and overruled the myriad cases every year in which courts block the Executive's proposed transfer based on a substantial risk of torture. *See discussion infra* at 25-26.[37] Moreover, because involuntary transfer to a foreign country has long been considered a form of custody for purposes of habeas corpus, *Chin Yow v. United States*, 208 U.S. 8, 12 (1908); *Jones v. Cunningham*, 371 U.S. 236, 238-241 (1963), a holding that courts may never question such an involuntary transfer would suspend the habeas writ for an entire class of detainee claims—which a *court* certainly may not do. *Boumediene*, 128 S. Ct. at 2262 (court may not effect a "de facto suspension" of habeas corpus); *Hamdi*, 542 U.S. at 562 (Scalia, J., dissenting) (habeas writ may only be suspended by Congress).

Rather, *Munaf* presumes that habeas courts will examine the national security and foreign policy concerns in each case and make an individual determination as to the propriety of issuing the writ. This is precisely what the Court did in *Munaf*. The Court considered the competing evidence on the risk of torture and determined it was "not the extreme case" where the Executive transfers a detainee de-

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[37] The Court of Appeals' reading of *Munaf* would also contradict the Court's explicit statement that it was *reserving* the question of whether the domestic statutory implementation of the Convention Against Torture – a claim not raised in the case – would authorize judicial review of an Executive transfer decision. *See Munaf*, 128 S.Ct. at 2226 n.6.

spite a recognized risk of torture,[38] 128 S. Ct. at 2226; consequently, and given its concerns over Iraq's territorial sovereignty, the Court found habeas relief was inappropriate and could not justify the injunction under review. *Id.* at 2223-26; *see also id.* at 2228 (Souter, J., concurring) (explaining Court's decision does not foreclose relief where "the probability of torture is well documented, even if the Executive fails to acknowledge it."). The Court of Appeals' holding forecloses the kind of review contemplated and performed in *Munaf*. *Amici* seek only an opportunity to present evidence (including evidence from the State Department, *see supra*), which might rebut the Executive's generalized (and empirically disproven) "assessment" that no risk of torture exists for a particular detainee. Without notice, there is no opportunity to ascertain whether a given petition presents an "extreme case." Indeed, without notice, such "extreme" behavior becomes all the more possible.

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[38] Specifically, while the Executive conceded that torture exists in some sectors of the Iraqi justice system, *i.e.*, the Ministry of the Interior, these petitioners were in fact to be transferred to the Justice Ministry, which the State Department had concluded "generally met internationally accepted standards for basic prisoner needs." *Id.* at 2226 (internal quotations omitted). Because the State Department supported the judgment of the military, the Government was "speak[ing] with one voice in this area." *Id.*

C. Neither the Rule of Non-Inquiry Nor the Separation-of-Powers Principles Underlying It Render the Judiciary Incompetent to Undertake Targeted Inquiries into Risk of Torture Upon Transfer.

Contrary to Judge Kavanaugh's concurring opinion, the Court of Appeals' overbroad reading of *Munaf* finds no support in the rule of non-inquiry or any separation-of-powers principles underlying it. *Cf. Kiyemba*, 561 F.3d at 517. First, because the rule of non-inquiry arises by implication exclusively from the formal extradition process, its underlying principles mandate that the rule be limited to that context. *See generally* M. Cherif Bassiouni, *The Law of International Extradition: United States Law and Practice* 604-42 (5th ed. 2007).[39] Moreover, the sepa-

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[39] Extradition, which must be pursued by statute, *see* 18 U.S.C. § 3184, deliberately divides responsibility between a judicial officer, who determines whether the statute permits transfer, and the Secretary of State, who is thereafter authorized by statute to accept or decline or attach conditions to the proposed extradition. *See* 18 U.S.C. § 3196; *United States v. Kin Hong*, 110 F.3d 103, 112 (1st Cir. 1997). The judiciary broadly defers to the Secretary of State's discretion in this extradition context only because Congress has expressly authorized such discretion. *Valentine v. United States* ex rel. *Neidecker*, 299 U.S. 5, 8-9 (1936) (extradition power "is not confided to the Executive in the absence of a treaty or legislative provision"). *Amici* and other Guantánamo detainees have not been afforded the statutory guarantee of judicial review that accompanies the formal extradition process.

ration-of-powers principles attributed to the rule of non-inquiry by the Court of Appeals primarily preclude judicial review of the procedural protections available in foreign judicial systems.[40] This is so in part because foreign sovereigns are not bound by U.S. constitutional norms, *see Neely v. Henkel*, 180 U.S. 109, 123 (1901), and in part because courts are not always well-suited to opine broadly about the comparative qualities of various foreign judicial systems, *see, e.g., United States v. Smyth*, 61 F.3d 711, 714 (9th Cir. 1995).

Petitioners and *amici* raise no such challenge here. Rather, they seek to present particular individualized facts which highlight the risk of *torture* they face upon transfer and to ensure compliance with the Executive's obligations under the Due Process Clause and the Convention Against Torture. United States courts undertake identical inquiries hundreds of times each year pursuant to the Refugee Convention, *see* 8 U.S.C. § 1101(a)(42)(A), *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987) (alien eligible for asylum upon demonstration of "well-founded fear of persecution" in his home country); *Ahmed v. Keisler*, 504 F.3d 1183, 1192, 1199 (9th Cir. 2007) (finding well-founded fear based on "totality of the circumstances"), or the Convention Against Torture, *see* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242 (U.S. shall not involuntarily return person to country where there are "substantial grounds" for finding a

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[40] *See* Parry, *supra* note 36 at 14-18.

risk of torture); *see also* 8 U.S.C. §1252(a); *Owino v. Holder*, 575 F.3d 956, 958 (7th Cir. 2009) (confirming jurisdiction of federal courts to review denial of CAT claim). As part of those inquiries, courts are fully competent and authorized to enjoin a transfer or deportation on grounds it is unsafe without having to consider the Government's "foreign policy interests." *Mironescu v. Costner*, 480 F.3d 664, 672-73 (4th Cir. 2007). In cases such as *amici*'s, courts are "required to answer only the straightforward question of whether a fugitive would likely face torture in the requesting country." *Id.*

Indeed, courts applying the rule of non-inquiry, including courts cited by the Court of Appeals, recognize an exception in severe cases for objections to transfer based on a fear of torture. *See Mironescu*, 480 F.3d at 673; *Kin-Hong*, 110 F.3d at 112; *Prushinowski v. Samples*, 734 F.2d 1016, 1019 (4th Cir. 1984); *accord Hoxha v. Levi*, 465 F.3d 554, 564 n.14 (3d Cir. 2006). Torture is rightly considered *sui generis* and represents a concern manifestly distinct from concerns related to procedural variations among criminal justice systems. *See In re Burt*, 737 F.2d 1477, 1485 n.11 (7th Cir. 1984)).

In any event, discretion granted to the Executive by this common law rule, as in any context, must be ultimately limited by the Constitution. *Mironescu*, 480 F.3d at 670 (Executive lacks the discretion to extradite a fugitive when extradition would violate his constitutional rights); *see also Wang v. Reno*, 81 F.3d 808, 811-12 (9th Cir. 1996) (petitioner may enjoin deportation in *habeas* context based on

substantive due process claims against U.S. government actors); *Burt*, 737 F.2d at 1482-85 (recognizing habeas challenges to transfer based on procedural and substantive due process grounds).

* * *

Obligating the Executive Branch to provide notice of a proposed transfer so that *amici* and other Guantánamo detainees may have an opportunity to present particularized evidence supporting a fear of torture "meddles little, if at all" in the Executive's foreign relations or Commander-in-Chief power. *Hamdi*, 542 U.S. at 535. The Court of Appeals' decision reduces the judiciary to a rubber stamp. The Court should grant *certiorari* to restore the "delicate balance of governance" among the three branches and to reassert the judiciary's role in protecting individuals from grave harm.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the petition for a writ of *certiorari* should be granted.

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